(4)

No. 06-1086

IN THE

Supreme Court of the United States

ROBERT L. JORDAN,
Petitioner,

v.

ALTERNATIVE RESOURCES CORP., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

I. THE DECISION OF THE FOURTH CIRCUIT IS INCONSISTENT WITH THE DECISIONS OF THIS COURT IN *BURLINGTON INDUSTRIES, INC. V. ELLERTH* AND *FARAGHER V. CITY OF BOCA RATON* 1

II. THE DECISION OF THE FOURTH CIRCUITS IS INCONSISTENT WITH THIS COURT'S DECISION IN *SWIERKIEWICZ V. SOREMA N.A* 7

CONCLUSION 10

TABLE OF AUTHORITIES

FEDERAL CASES — Page

Barrett v. Applied Radiant Energy Corp., 240 F.3d 262 (4th Cir. 2001) 2
Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998) ..... *passim*
Celotex Corp. v. Catrett, 477 U.S. 317 (1986) 8
Clark County School District v. Breeden, 532 U.S. 268 (2001) 3, 4, 5
Faragher v. City of Boca Raton, 524 U.S. 775 (1998) 2, 3, 4, 5
George v. Leavitt, 407 F.3d 405 (D.C. Cir. 2005) 5
Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993) 4
Hill v. McDonough, 547 U.S. ___, 126 S. Ct. 2096 (2006) 9
Jones v. Bock, ___ U.S. ___, 127 S. Ct. 910 (2007) 9
Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 507 U.S. 163 (1993) 7, 8
Matvia v. Bald Head Island Management, Inc., 259 F.3d 261 (4th Cir. 2001) 2
National RR. Passenger Corp. v. Morgan, 536 U.S. 101 (2002) 4
Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75 (1998) 9
Reeves. v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000) 9
Swierkiewicz v. Sorema NA, 534 U.S. 506 (2002) 7, 8, 9

FEDERAL STATUTES

42 U.S.C. § 2000e-2(m) 9
42 U.S.C. § 2000e-3(a) 5

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I. THE DECISION OF THE FOURTH CIRCUIT IS INCONSISTENT WITH THE DECISIONS OF THIS COURT IN *BURLINGTON INDUSTRIES, INC. V. ELLERTH* AND *FARAGHER V. CITY OF BOCA RATON*

The nature of the interpretation of section 704(a) adopted by the Fourth Circuit is not in dispute. Under the decision below, an employee who is subjected to an act of racial or sexual harassment can lawfully be fired simply for reporting the harassing conduct to the employer. The anti-retaliation provision in section 704(a), the Fourth Circuit held, just does not apply until there have been so many acts of harassment that they have created (or almost created) an actionable hostile work environment. In the case of sexual harassment,

the victim is not protected from retaliation when she tells the harasser himself that his initial sexual advances or groping are unwelcome, or merely asks him to stop.

Permitting such acts of retaliation, respondents contend, is entirely consistent with this Court's decisions in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). Neither *Ellerth* nor *Faragher*, respondents insist, require or even encourage harassment victims to complain (or object) when racial or sexual harassment first begins.

No member of the Fourth Circuit agreed with respondent's reading of *Ellerth* and *Faragher*, and seven disagreed. Even the panel majority embraced decisions holding that *Ellerth* and *Faragher* require that an employee "loses his right to a judicial remedy" (Pet. App. 15) if he fails to report harassment at the earliest opportunity. (*See* Pet. App. 13, *citing Matvia v. Bald Head Island Management, Inc.*, 259 F.3d 261 (4th Cir. 2001), and *Barrett v. Applied Radiant Energy Corp.*, 240 F.3d 262 (4th Cir. 2001).) Judge King, dissenting from the panel decision, noted that a worker who postponed complaining until the harassment had become actionable would have "no legal recourse" to redress that harassment in light of *Ellerth*. (Pet. App. 38a). And five members of the Fourth Circuit (including Judge King), dissenting from the denial of rehearing *en banc*, observed that under *Ellerth* workers who wait to complain until they are within the protections of section 704(a), as narrowly construed by the panel, would lose their "hostile environment claims." (Pet. App. 57a).

We showed in the petition that the prevailing interpretation among the courts of appeals, as in the Fourth Circuit, is that under *Ellerth* harassment victims forfeit their hostile environment claims by failing to invoke the employer's anti-harassment policies as soon as the harassment begins. (Pet. 10-11). Respondents do not in any way dispute (or, indeed,

refer to) our characterization of the prevailing law on this issue in the lower courts. Nor do respondents identify a single case in the nine years since *Ellerth* and *Faragher* which has ever adopted the view, now advanced by respondents, that those decisions neither require nor even encourage complaints about harassment when that abuse first begins.

The dissenting opinions below cogently explained the hopeless dilemma faced by an employee who under *Ellerth* loses his or her hostile environment claims by not complaining when the harassment begins, but who under the panel decision forfeits the protections of section 704(a) by complaining that soon. Respondents reply that this interpretation of Title VII exists in other circuits. (Br. Opp. 5). That persuasively demonstrates, not that the framers of Title VII intended to create this quandary, but only that the problem is regrettably widespread.

Ellerth expressly stated the Court's desire to "encourage employees to report harassing conduct *before it becomes severe or pervasive*." 524 U.S. at 764 (emphasis added). Respondents assert that this seemingly unambiguous holding must be "read in conjunction with" the decision three years later in *Clark County School District v. Breeden*, 532 U.S. 268 (2001) (*per curiam*). (Br. Opp. 17). According to respondents, *Breeden "squarely held* that, where a reasonable person could not believe that the opposed activity was in violation of Title VII, there could be no claim for retaliation under section 704(a)." (Br. Opp. 11)(emphasis added). If *Ellerth* meant what it said, respondents argue, the Court in *Breeden* "presumably would have . . . reached a different result." (Br. Opp. 18). *Breeden*'s supposed adoption of a reasonable belief standard shows, according to respondents, that *Ellerth* never meant to require or encourage workers to complain about the onset of racial or sexual harassment. (Br. Opp. 18).

This argument is defective in both its premise and its logic. First, the Court in *Breeden* had "no occasion to rule on the propriety" of the Ninth Circuit's reasonable belief rule in retaliation cases, let alone its contours. *See* 532 U.S. at 269. Second, nothing in *Breeden* altered the holding—or undermined the rationale—of the earlier decisions in *Ellerth* and *Faragher*. *Ellerth* and *Faragher* correctly ruled that a central purpose of Title VII is to *prevent* unlawful sexual and racial harassment from occurring at all, a purpose which depends on the willingness of harassment victims to complain to their employers when the harassment begins. This objective is frustrated when prompt reporting of harassment becomes a firing offense.

Like the Fourth Circuit, respondents confuse two distinct concepts—unlawfulness and actionability. Not all unlawful practices are immediately actionable. For example, the EEOC noted below that an employee who objects to a supervisor's plan to hire only men in the future—an unlawful employment practice—is protected from retaliation, even if the plan has not been implemented and no actionable violation yet exists. Similarly, the Court has held that a hostile work environment based on sexual or racial harassment is an "unlawful employment practice" under Title VII, *e.g.*, *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993), but the Court has also explained that a hostile environment arises over time, with the aggregation of individual actions that are not separately actionable in court. *National RR. Passenger Corp. v. Morgan*, 536 U.S. 101, 115 (2002).

All hostile work environments have a starting point, and there is always a first act which, if never repeated, might well be viewed in isolation as insufficient to create a hostile environment. It is only in hindsight that one can know whether that first act was a harbinger or an aberration. In *Ellerth* and *Faragher*, however, the Court encouraged employees not to

wait until they have an actionable claim before reporting discriminatory conduct.

Respondents' theory means that there is a window of opportunity—between the commencement of harassment and the point at which the harassment becomes actionable—during which an employer can get rid of the problem by firing any employee who reports the misconduct. Petitioner has observed before that it is unlikely that the Court used a *per curiam* opinion in *Breeden* to work so significant a departure from *Ellerth* and *Faragher*. (Pet. at 18-19). Still, some courts (including the Fourth Circuit below and the District of Columbia Circuit in *George v. Leavitt*, 407 F.3d 405, 417 (D.C. Cir. 2005)) have read *Breeden* as creating this opportunity—if not incentive—for retaliation. The Court should clarify that section 704(a) protects employees who report discriminatory conduct, even if it is not immediately actionable, because those workers are acting to prevent an unlawful employment practice from arising.

In this regard, respondents assert that the text of section 704(a) does not protect employees unless their employer has actually committed a violation of Title VII, or come so close that a worker could reasonably believe that a violation had occurred. The statutory text, however, does not mandate such a narrow interpretation. The statute forbids retaliation against an employee because he or she "has opposed any practice made an unlawful employment practice by this title." 42 U.S.C. § 2000e-3(a). In this case, petitioner Jordan promptly reported racial harassment that even respondents acknowledge was "jarring." (Br. Opp. 13). In particular, he called his employers' attention to information which they needed—and which their own anti-harassment policies solicited—in order to "prevent and correct promptly any . . . harassing behavior," *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807. Quite simply, Jordan "opposed" a hostile work environment by giving his employers information to "prevent and correct" it.

The Equal Employment Opportunity Commission, which supported petitioner throughout the appellate process below, thought his report of crude racism fit comfortably within the statutory text:

> § 704(a)'s protection applies not only to individuals who oppose Title VII violations that have actually occurred, but also to individuals who attempt to prevent a violation from occurring. This interpretation conforms to the ordinary meaning of the word "oppose," the crucial term in the relevant statutory text. * * * [For example,] a person who acts to prevent abortions from occurring is commonly said to be "opposing" abortion.

Amicus Brief of EEOC in Support of Request for Rehearing *En Banc* at 6-7, *Jordan v. Alternative Resources Corp.*, No. 05-1485 (4th Cir.) (Sept. 25, 2006).[1]

Respondents insist that there is nothing in the least amiss in both encouraging (or even requiring) employees (under *Ellerth*) to complain as soon as harassment begins, and also permitting employers (under the panel's interpretation of section 704(a)) to systematically fire all workers who do so. These two interpretations of Title VII, respondents assert, have co-existed "harmoniously" in the lower courts. (Br. Opp. 19). But the failure of the lower courts to recognize the quandary they have created for workers does not make the problem any less real. As both the EEOC and five members of the Fourth Circuit have explained, the combined effect of these two lines of cases poses a serious obstacle to the

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[1] Of course, an employee who reports harassment before it is actionable is not entitled to relief, assuming there is no retaliation. The action of the employee in reporting that harassment, however, precludes an employer from asserting the affirmative defense recognized by *Ellerth* and *Faragher*. And an employer who receives such a report is not legally obligated to take any action, although a wise employer would make some effort to investigate and prevent objectionable conduct, as *Ellerth* and *Faragher* encourage.

enforcement of Title VII. Certiorari should be granted to resolve this problem.

II. THE DECISION OF THE FOURTH CIRCUIT IS INCONSISTENT WITH THIS COURT'S DECISION IN *SWIERKIEWICZ V. SOREMA N.A.*

The amended complaint in this case alleged that respondents fired Jordan "because he is African-American" and that his "race was a motivating factor" in his discharge. (Pet. App. 43a). Respondents contend that the complaint fails to state a claim on which relief can be granted, and thus was properly dismissed under Federal Civil Rule 12(b)(6). The reasons proffered by respondents are a compelling demonstration of the inconsistency between the Fourth Circuit's interpretation of Rule 12(b)(6) and this Court's decision in *Swierkiewicz v. Sorema NA*, 534 U.S. 506 (2002).

Respondents, enthusiastically quoting the Fourth Circuit, insist the complaint is defective because a finding of racial motivation would not be a "fair inference[]" from the facts set out in the complaint. (Br. Opp. 22, *quoting* Pet. App. 23a). To be legally sufficient, respondents and the Fourth Circuit say, the facts set out in the complaint must be sufficient that a finding of discrimination would be "fair[ly] infer[red]" from those alleged facts without "mere speculation and argument." (Br. Opp. 22, *quoting* Pet. App. 23a). Respondents argue that the Fourth Circuit acted properly in evaluating all the factual allegations in complaint "as a whole," and in deciding whether those facts—if proven—would support an inference of racial discrimination. (Br. Opp. 21-24).

The requirement that a complaint include such specific probative factual allegations is precisely the approach unanimously rejected by this Court in *Swierkiewicz* and in *Leatherman v. Tarrant County Narcotics Intelligence and Coordi-*

nation Unit, 507 U.S. 163 (1993).[2] Nevertheless, respondents argue that the absence of such allegations "demonstrated that [Jordan] had no relevant facts." (Br. Opp. 23). If a defendant could demonstrate that a plaintiff had "no relevant facts" to support his or her claim, the claim could properly be dismissed—but not on the pleadings. Rather, the procedure for seeking such a dismissal is a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure, under which the defendant must demonstrate through discovery and other evidentiary material that the plaintiff lacks the evidence necessary to sustain the claim. *See Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). The essential teaching of *Swierkiewicz* and *Leatherman* is that Rule 12(b)(6) does not require that a complaint contain the same material that would be sufficient to survive a motion for summary judgment.

Respondents suggest that the Fourth Circuit's requirement that the complaint contain facts that would fairly support an inference of discrimination applies only to complaints that actually contain facts; a complaint with only a "bald allegation" of discrimination might survive. (Br. Opp. 22). But once a plaintiff starts to assert facts, the Fourth Circuit holds, he or she must then proceed to specify facts which would justify the trier of fact in inferring the existence of a discriminatory motive. As a practical matter, however, *all* complaints contain at least some factual allegations, and thus fall under the Fourth Circuit's rule. *Swierkiewicz* itself requires that a plaintiff give "fair notice of what [his or her] claims are and the grounds upon which they rest." 534 U.S. at 514.

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[2] *See Swierkiewicz*, 534 U.S. at 509 (district court dismissed complaint because it did not contain "circumstances that support an inference of discrimination"; court of appeals affirmed dismissal because the allegations in the complaint did not "raise an inference of discrimination").

Respondents object that the complaint here is insufficient because it fails to allege the race of the supervisors involved in Jordan's termination, suggesting that *Swierkiewicz* requires such allegations. (Br. Opp. 22, *citing Swierkiewicz*, 534 U.S. at 511). *Swierkiewicz* assuredly does not contain any such pleading requirement. This Court has made clear that a plaintiff can establish a claim of discrimination even though the alleged discriminatory official was the same race, gender or age as the plaintiff. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 139, 152-53 (2000)(age); *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 78-79 (1998)(race, gender).

Finally, respondents assert that the complaint did not state a claim for racial discrimination because the allegations, if true, demonstrated that Jordan had been fired for "a different motive," retaliation. (Br. Opp. 23). This argument ignores Federal Civil Rule 8(a), which expressly permits pleading in the alternative. In addition, the existence of a retaliatory motive would not prove that racial discrimination had not also occurred. Title VII is not premised on the view that a given employment action, such as a dismissal, could only be the result of a single impermissible motive. To the contrary, section 703(m), 42 U.S.C. § 2000e-2(m), provides that a plaintiff can prevail if race "was a motivating factor for any employment practice, even though other factors also motivated the practice."

Twice since *Swerkiewicz*, the Court has again rejected judicially crafted pleading requirements that exceed what is called for under the Federal Rules. *Hill v. McDonough*, 547 U.S. ___, 126 S. Ct. 2096 (2006); *Jones v. Bock*, ___ U.S. ___, 127 S. Ct. 910 (2007). Yet that is precisely the Fourth Circuit's error here.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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